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ABSTRACT

A growing emphasis on teacher accountability, coupled with declining enrollments and reduced revenues, has increased the importance of teacher evaluations as a basis for staffing decisions, even though there is no clear definition of teacher effectiveness. Accordingly, legal standards are provided for the procedural and substantive issues of due process that have arisen in connection with teacher evaluation. State courts have upheld decisions requiring (1) deadlines for completing evaluations, (2) advance notice to teachers of evaluation criteria and procedures, (3) notice of unsatisfactory evaluation and opportunity to defend against charges, (4) reasonable remediation period to correct alleged deficiencies, (5) specification of deficiencies to provide clear guidance for remediation, and (6) an opportunity to obtain assistance in correcting deficiencies. The substantive issues which the courts have addressed are not based on objective criteria for evaluating teacher performance, but rather on the relation of facts to standards individually applied. There must be just cause for dismissal, based on a rational relation between conduct complained of and duties to be performed. The other legal issue discussed involves the use of the National Teachers Examination (NTE) in employment decisions. Although the NTE has no predictive validity for teaching skill, the Supreme Court in "U.S. vs. South Carolina" found that it has content validity in assessing base knowledge and therefore is rationally related to legitimate state decisions. (TE)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

1904 Association Drive

Reston, Va. 22091

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TEACHER EVALUATION

Community and governmental demands for visible education results, effectiveness, and efficiency have resulted in a growing number of legislative mandates designed to make the educational system more accountable to the public. Teacher accountability has been a major legislative and judicial activity. The public wants evidence that teachers are effective in their jobs or that efforts are being made to either improve their performance or remove them. In an attempt to hold teachers accountable for performance and effectiveness, various proposals for teacher evaluation and minimum competency testing have been adopted by boards of education and state legislatures.

Although no one would question the importance of good teaching to the provision of good education, the appraisal of teacher performance has presented numerous and nettlesome problems. One major problem inherent in teacher evaluation is that there is no clear definition of what characterizes an effective teacher or constitutes effective teaching and, consequently, no definitive measures to be used for teacher evaluation. Any evaluation process is essentially a comparison of desired outcomes with actual outcomes. If the situation exists where not only the results but in many cases the desired outcomes are in question, then the task of evaluation becomes extremely difficult.

A second major problem in teacher evaluation emanates from what often are perceived as being the conflicting purposes of evaluation. On the one hand, evaluation is perceived as having positive results such as the improvement of instruction and the identification and encouragement of effective teachers. However, in the lexicon of the teacher, evaluation often has been viewed as a basis to make nonretention, demotion, reassignment, or dismissal decisions. The situation created by these varying interpretations often generates negative feelings between those being evaluated and those doing the evaluating.

In spite of the problems associated with conducting teacher evaluations, it seems likely that with the growing public demand for accountability, declining enrollments, and reduced revenues, teacher evaluation increasingly will be used for the purpose of providing information needed to make staffing decisions. As this occurs, teachers and their professional organizations are concerned that they be afforded appropriate procedural protections. They want assurance that teachers will not be released without adequate evaluation procedures.¹ With the interest and concern that not only teachers but administrators and governing bodies have in teacher evaluation, it is imperative that all parties be knowledgeable of the legal issues involved in evaluation. In this Memorandum legal standards that should serve as guidelines in the teacher evaluation process are presented.

¹Dale L. Bolton, *Evaluation of Administrative Personnel in School System* (New York: Teachers College Press, 1980), pp. 9-10.

The courts become involved with teacher evaluation cases only at the appeal stage. Traditionally, courts have accepted the authority of school boards or administrators to determine standards of teacher performance. The judiciary has tended to steer clear of making judgments about a particular teacher's competence, preferring whenever possible to accept the judgment of school boards or administrators.² As a result, the major focus in most cases has been related to procedural requirements that must be followed in the evaluation process. The facts of the cases relating to the substantive issue of instructional effectiveness have been given minimal consideration and have been confined to a review of the administrative record to determine whether sufficient facts were addressed to establish a violation of the particular standard.³

In recent years, however, courts increasingly have engaged in a more detailed analysis of what constitutes incompetence or unsatisfactory teacher performance. They are evidencing a greater willingness to review the decisions of school authorities in order to ensure that relevant, probative, and substantial evidence supports the findings and conclusions relative to statutory causes for dismissal. Thus, recent litigation involving teacher evaluation and the guidelines that have ensued are concerned not only with procedural due process, but also with substantive due process.

Procedural Due Process in Teacher Evaluation

The term "due process" is found in the 14th Amendment which guarantees that no state shall "deprive any person of life, liberty, or property without due process of law." According to the United States Supreme Court, the application of this procedural guarantee in teacher employment cases involves a two stage analysis. First a determination must be made of whether the asserted individual interests are encompassed within the 14th Amendment's protection of life, liberty, or property. If liberty or property interests are implicated, a determination then must be made of what process is due.⁴ A property interest is a legitimate entitlement to continued employment that is created under the laws, rules, regulations, and contracts of the state. The granting of tenure can vest a teacher with a property right to continued employment as can an employment contract. A liberty interest, on the other hand, is involved whenever governmental action creates a stigma or damages the teacher's reputation to the extent that it forecloses opportunities to obtain subsequent employment.

If either a property interest or a liberty interest is involved in an adverse employment decision, procedural due process must be afforded. When teacher evaluations are a factor in these decisions, the courts look to standards of procedural due process embodied in employment contracts, state law, board regulations, or court decisions to determine the propriety of such decisions.

Where standards for teacher evaluation have been promulgated at the state or local level, courts will expect the school district to adhere to these legislative or administrative procedural safeguards. For example, state statutes related to teacher evaluation or employment decisions normally specify a deadline for completing evaluations, and the failure of the school district to evaluate a teacher before the legal deadline may be held to constitute a satisfactory rating.

² Robert J. Munnelly, "Dealing with Teacher Incompetence: Supervision and Evaluation in a Due Process Framework," *Contemporary Education*, Summer 1979, p. 221.

³ Joseph C. Beckham, *Legal Aspects of Teacher Evaluation* (Topeka, Kans. National Organization on Legal Problems of Education, 1981).

⁴ See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

A California school district's decision not to renew a teacher's contract was challenged on the grounds that the district did not abide by announced notification deadlines nor provide the teacher with written evaluations in accordance with the rules and regulations for evaluating employees as set forth by the district and by the state education code.⁵ The district maintained that applicable statutes made nonrenewal of teachers a discretionary matter, not subject to judicial review. The California appeals court ruled that although the legislative intent in such statutes was to allow districts to remove unsatisfactory teachers in a "streamlined manner without a hearing," the trial court did not have jurisdiction to review the district's decision to the extent of determining whether the district complied with its own procedural requirements. The court concluded that the legislature intended that statutory standards for evaluation, including those related to deadlines and notice, be observed with care.

Some states have adopted statutes that require school districts to advise teachers of the criteria and procedures to be used in the evaluation process as well as to provide adequate notice of an unsatisfactory evaluation. Cases involving employment decisions in these states hinge upon whether required procedures have been met. In a Florida case, two teachers challenged a notice of nonrenewal on the grounds that they were not properly evaluated or notified of their purported deficiencies in performance.⁶ State law required "that the superintendent shall establish procedures for assessing the performance of the duties and responsibilities of all instructional personnel." Additionally, it required that "[p]rior to preparing the written report of assessment, each individual shall be informed of the criteria and procedure to be used.... The written report of assessment for each individual shall be shown to him and discussed by the person responsible for preparing the report." The superintendent had established district evaluation procedures which provided that each teacher have at least one observation for evaluation purposes before January 31 of the school year and that the evaluator provide feedback to the teacher. The procedures also stipulated that an evaluation conference would occur before the evaluation was signed. The school board denied the teachers' petition for a review of the principal's decision not to renew their contracts claiming it had not adopted a policy on evaluation. The court concluded that if the board were aware of an evaluation policy which had been established by the superintendent, it was its duty to adopt appropriate regulations. But, even assuming it had no responsibility to adopt an evaluation procedure, the board still had a duty as the responsible agency under the state's Administrative Procedure Act to accord a hearing to the teachers if disputed issues of material facts relative to alleged disregard for the superintendent's evaluation procedures were involved. Accordingly, the court ordered reinstatement of the teachers.

In a similar case in Iowa, a second year teacher was terminated by the school district without either prior notice that this action was contemplated or reasons for termination prior to a private hearing on the matter.⁷ Iowa law requires that at least 10 days prior to any notice of termination the board notify the teacher in writing that termination is being considered. It also requires the board to provide a private hearing upon request and a list of reasons for considering termination. The Iowa Supreme Court held that strict compliance with

⁵ Anderson v. San Mateo Community College Dist., 151 Cal. Rpts. 111 (Cal. App. 1978).

⁶ Witgenstein v. School Bd. of Leon County, 347 So. 2d 1069 (Fla. Dist. Ct. App. 1977).

⁷ Kruse v. Board of Lamoni Community School Dist., 231 N.W. 2d 626 (Iowa 1975).

this statute is required of a school district seeking to terminate a teacher. The court ruled that the teacher "was entitled to know the reasons relied upon by the board in considering the termination of her contract and to have a fair opportunity to defend against such charges."

When school boards have established due process standards regarding evaluations and employment decisions, courts are adamant that school officials must comply with the standards. In an Oklahoma case, school board policy specified that notice of nonrenewal including reasons must be given to teachers. A teacher received notice of nonrenewal and made several written requests to be advised of the reasons for the action, but no reasons were given. The Oklahoma Supreme Court ruled that the school board had the authority to make such a policy even where to do so would exceed state statutory requirements, and concluded that the teacher was entitled to notice with reasons and an opportunity to be heard.⁸

Similarly, a New York teacher who was given an unsatisfactory rating by a principal, which was later endorsed by the acting superintendent, was reinstated by the courts on the basis that the board of education had violated its own bylaws. The court noted that the superintendent had concurred with the rating without inspecting the teacher's work or consulting with him.⁹

In reviewing the elements of procedural fairness required in the evaluation process, courts also have emphasized the reasonableness of time periods in which an employee might be expected to improve. An Illinois case involved a special education teacher who had received partly unfavorable evaluations for several years.¹⁰ In the years in question, 1975-76 and 1976-77, evaluations also were mixed. The teacher was issued a formal notice to remedy deficiencies in April 1976 but was rehired for the 1976-77 school year. Close supervision and observation continued in that year. In early February 1977, the teacher was advised again of deficiencies in his teaching performance and signed a statement that he had discussed the report with school administrators and that 45 days was an adequate length of time to remedy all of the deficiencies. On February 22, 1977, a formal notice to remedy the teaching defects was sent to the teacher by the school board. Following several evaluations generated in March 1977, the board voted to dismiss the teacher on April 4. On appeal, the Illinois court concluded that the board failed to give the teacher a reasonable remediation period to correct alleged deficiencies. The court reasoned that a remediation period is only triggered by board action (February 22) not by unofficial notices by school administrators. Thus, the teacher was given at most only 41 calendar days (and only 15 school days) between his notice and dismissal, and not the full 45 days as agreed. In addition, to ensure the teacher his statutorily protected opportunity for remediation, dismissal should have been based on evaluations conducted after, not during, the remediation period.

In reviewing questions of procedural fairness in employment decisions linked to evaluations, the courts also have considered whether the reasons given are sufficiently clear so as to provide the teacher with directions for correction of deficiencies. In an Arizona case, a teacher was given a notice of intent to dismiss which stated he would be dismissed 30 days later.¹¹ Arizona statute provided that at least 90 days prior to a notice of intention to dismiss, a teacher

⁸ Miller v. Independent School Dist. No. 56, 609 P. 2d 756 (Okla. 1980).

⁹ Longarzo v. Anker, 578 F. 2d 469 (2nd Cir. 1978).

¹⁰ Bd. of Educ. of School Dist. No. 131 v. Illinois State Bd. of Educ., 403 N.E. 2d 277 (Ill. App. 1980).

¹¹ Orth v. Phoenix Union High School System No. 210, 613 P. 2d 311 (Ariz. App. 1980).

must be given "written preliminary notice of his inadequacy, specifying the nature thereof with such particularity as to furnish the teacher an opportunity to correct his inadequacies." The court found that a letter written by the principal more than 90 days prior to the notice of intent to dismiss did not meet the statutory requirements for a preliminary notice of inadequacy. The letter was considered a reminder and did not contain a list of deficiencies with such particularity as to provide the opportunity to correct.

In a Mississippi case, a third grade teacher was dismissed by the superintendent after meetings with parents who complained about the teaching methodology employed with accelerated students.¹² Prior to this, the teacher always had received the highest possible ratings. After the meetings with the parents and a school board meeting where a number of parents voiced complaints about the teacher, the superintendent sent the teacher a letter of reprimand and a plan of improvement which he requested that she sign. The teacher refused to sign, asserting that she was unaware of the basis justifying the imposition of the plan. Upon her refusal to sign the letter, the superintendent removed her from her position. In its review, the court concluded that most, if not all, of the 12 items of concern in the plan for improvement were ambiguous and incapable of placing the teacher on notice of the specific conduct which was proscribed. The court also found that the removal of the teacher in the absence of adequate notice of charges and without a hearing was a denial of due process. Accordingly, her reinstatement was ordered.

In Missouri, a teacher was given notice that she was being terminated because "improvements were needed in the areas of relationships with students, enthusiasm for teaching, disciplinary policies, and relationships with parents."¹³ Missouri law requires that a notice of specifics be given a teacher at least 30 days prior to termination and that the teacher then be given 30 days to remediate. The Missouri Court of Appeals ruled that the notice given the teacher did not show what improvements were needed.

Procedural fairness in evaluation proceedings also requires that the teacher be given the opportunity to improve and to obtain assistance in correcting deficiencies. In a Maine case, a teacher's evaluation resulted in the recommendation that the administration "acquaint her with acceptable teaching practices and help her implement these training strategies in her classroom."¹⁴ Subsequently, the superintendent sent her a written recommendation that she visit other teachers early in the fall and that she be visited frequently by the building principal. Acting pursuant to this recommendation, at the beginning of the new year, the teacher approached her building principal who refused to comply with the suggestion of the superintendent and essentially told her to do it on her own. The court found that a dismissal without affording the teacher an opportunity to improve her professional performance lacked just cause.

In a Washington case, a high school counselor, who had been reassigned as a junior high mathematics teacher and who had filed a formal grievance contesting this transfer, was terminated at the end of his second year in the position.¹⁵ In January of that year, the teacher had been notified that he was on probation

¹² Cantrell v. Vickers, 495 F. Supp. 195 (N.D. Miss. 1980).

¹³ Pollard v. Bd. of Educ. Reorganized School Dist. No. 3 Platte County, Missouri, 533 S.W. 2d 667 (1976).

¹⁴ Bd. of Directors of Maine School Admin. Dist. No. 75 v. Merrymeeting Educ. Ass'n., 354 A. 2d 169 (Me. 1976).

¹⁵ Van Horn v. Highline School Dist. No. 401, 562 P. 2d 641 (Wash. App. 1977).

until April 15 and that further evaluation of his performance would be made during the probationary period. The stated reason for probation was failure to maintain adequate discipline. The teacher was given no hearing or opportunity to respond to the deficiencies listed in the probationary letter. During the probationary period, evaluations were made, but copies of the evaluations were not provided to the teacher until he requested them. Also, none of the evaluators reviewed their findings with the teacher. The teacher's contract was not renewed in executive session where the school board considered only an oral presentation by the superintendent. The Washington Court of Appeals held that deficient teaching conduct which is remediable (that is, reasonably correctable) cannot constitute sufficient cause for discharge in the absence of compliance with statutory notice and probationary procedures designed to provide the teacher with a fair opportunity to correct deficiencies.

Substantive Due Process in Teacher Evaluation

Violations of substantive due process occur when the government denies individual rights to liberty or property through acts that represent an arbitrary exercise of government power. In considering substantive due process claims, the courts go beyond the procedural question to examine the justification for the action. The question of substantive fairness in school board employment decisions predicated on teacher evaluations were sufficient to meet the requisite standard of substantial evidence. Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion. In essence, did the evaluations produce evidence sufficient to defend the governmental action against the charge of being arbitrary and capricious?

In using teacher evaluations as support for employment decisions, courts have recognized that a rational relationship must exist between the conduct being complained of and the duties to be performed. Since teacher evaluations primarily are used to assess classroom performance, they can be critical in establishing this relationship. In part, this performance assessment protects the individual teacher from arbitrary dismissal and, in part, it protects students who are entitled to an adequate and meaningful educational opportunity which is abridged if incompetent or inefficient teaching prevails.

The courts have reasoned that there are few, if any, objective criteria for evaluating teacher performance or determining what constitutes just cause for dismissal. Therefore, each case must be assessed on its own facts and the standard of substantial evidence individually applied.

In a 1982 Nebraska case, a court ruled that the termination of an elementary math teacher was not supported by evidence and ordered the teacher reinstated.¹⁶ The school board stated that its charge of incompetency was based upon the fact that the teacher had not satisfied the standards of competent professional performance adopted by the state professional practices commission. The court ruled that these standards were adopted by the commission for carrying out its statutory function and were not designed for use by a school district. The board's action apparently was triggered by complaints raised by some parents that the teacher gave too much homework which supposedly caused their children emotional suffering. The court found that the evidence presented did not support the charges of the board. The superintendent conceded that he had not

¹⁶ Schultz v. Bd. of Educ. of School Dist. of Fremont, Nebraska, 315 N.W. 2d 633 (Neb. 1982).

personally evaluated the teacher but based his decision on the recommendation of the elementary supervisor. The elementary supervisor in turn conceded that she could not evaluate the teacher because she had not spent enough time in her classroom. The principal, however, had evaluated the teacher and rated her performance as satisfactory and recommended her for renewal. Evaluations from prior years also indicated average, above average, or superior performance in almost every category. Based on this evidence, the court ruled that the school board, as a matter of law, had not met its burden of establishing just cause for termination.

In a South Dakota case, a teacher whose contract was not renewed on the basis of incompetency challenged the evaluation of her teaching performance, claiming the evaluations were insufficient to meet the requisite standard of substantial evidence.¹⁷ In each of the three years she had taught in the district, formal evaluations contained criticisms of her method of instructional organization and her lack of classroom order and discipline. Suggestions for improvement in these areas of deficiency also had been given. The teacher admitted that she did not implement the suggested corrective measures, stating that her methods of teaching were better. The board's determination of incompetency was based on an assessment of the teacher's unsatisfactory performance in creating an appropriate classroom atmosphere, developing student interest and attitudes, and possessing and demonstrating positive qualities of organization. The evidence of incompetency presented was generated in a large part by the teacher evaluation forms which were prepared by the principal in the course of observing the teacher's classroom performance. The Supreme Court of South Dakota found the evaluations to be sufficient to support the charge of incompetence and upheld the nonrenewal.

The National Teachers Examination in Teacher Evaluation

An issue that has gained attention in the area of teacher evaluation is the use of the results of the National Teachers Examination (NTE) in employment decisions. The primary complaint has been that the use of NTE scores unconstitutionally discriminates against minority teachers. In an early case in Mississippi, where the use of NTE scores together with other data resulted in dismissal of a far greater number of black teachers than white teachers, use of the test was invalidated.¹⁸

In Virginia, a county board of education required a minimum score of 500 on the NTE for employment and for transferring teachers under contract to other schools in the system. Certain black teachers brought suit, alleging that the use of the test violated the equal protection clause of the 14th Amendment because a higher percentage of black teachers failed the test than white teachers. The district court found that although the NTE had no predictive validity it did have content validity and that, although more black than white teachers were eliminated, there was no racial motivation in the use of the test. The court concluded that the board was justified in trying to employ the best qualified teachers and upheld the use of the NTE by the school board.

The Fourth Circuit Court of Appeals, however, reversed the lower court's decision and ordered reinstatement of all teachers dismissed from their positions solely on the basis of NTE scores.¹⁹ The appellate court said that the burden of showing a lack of racially motivated purpose falls on the school district, and that

¹⁷ *Busker v. Board of Educ. of Elk Point*, 295 N.W. 2d 1 (S.D. 1980).

¹⁸ *Baker v. Columbus Municipal Separate School Dist.*, 462 F. 2d 112 (5th Cir. 1972).

¹⁹ *Walston v. County School Bd. of Nansemond Cty.*, 492 F. 2d 919 (4th Cir. 1974).

evidence failed to show that NTE scores bore any demonstrable relationship to successful job performance. It therefore found the practices employed by the school district to be discriminatory. The court also noted that the Educational Testing Service itself cautions against the use of the NTE as the sole criterion for selection of teachers and explicitly states that the NTE is not intended as a measure of classroom teaching performance.

In United States v. South Carolina, however, the United States Supreme Court affirmed a lower court decision, upholding the use of NTE scores as a prerequisite to teacher certification and as a basis for placing teachers on the salary scale.²⁰ The Supreme Court stated that while the evidence was undisputed that blacks do not score as well as whites on the NTE, there must be evidence of state intent to create and use a racial classification scheme in order to establish a violation of the 14th Amendment. The court found no discriminatory intent and concluded that the test was being used to further the legitimate state goal of improving the quality of teachers. The court accepted a content validity study, based on judgments of teacher educators, as justification for the continued use of the NTE for certification and salary level determination. Recognizing that passage of the NTE does not ensure success as a teacher, the court reasoned that teachers who do not demonstrate mastery of the basic material on the test have little likelihood of satisfactory teaching performance. Thus, the court concluded that the use of the test was rationally related to legitimate state objectives.

Conclusion

Although it may seem to some school administrators or boards that the legal parameters of teacher evaluation are too constricting, in fact there exists no real conflict between effective evaluation practices and due process rights of teachers. Due process considerations are consistent with the goal of evaluation which is to improve instruction. Due process speaks to fairness. In teacher evaluation, fairness implies that (1) the teacher knows what standards of performance are expected and what criteria and procedures will be used in evaluation; (2) evaluations take place within reasonable time frames; (3) adequate notice of evaluation results is provided; (4) the reasons for an employment decision or notice that remediation is needed is of such clarity as to provide the teacher direction for correction; (5) a reasonable time is given to carry out prescribed improvement; (6) the teacher is given a chance to improve; and (7) the evaluation is of a form and nature to provide substantial evidence for employment decisions. If these elements of fairness are incorporated into a school district's evaluation policy, employment decisions will be more defensible. Also, individual and school improvement in the quality of instruction will be facilitated.

²⁰ 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026 (1978).

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